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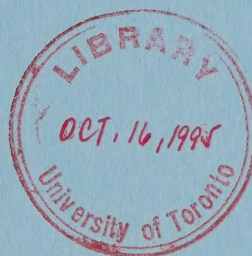


National Energy Board

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Reasons for Decision

**Niagara Gas Transmission
Limited**



September 1995

Jurisdiction

National Energy Board

Reasons for Decision

In the Matter of

Niagara Gas Transmission Limited

Letter dated 21 July 1995 from Consumers' Gas requesting a decision on the jurisdictional question raised by the National Energy Board in its letter of 19 May 1994

September 1995

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as represented by the National Energy Board

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Abbreviations

Act	<i>National Energy Board Act</i>
Board	National Energy Board
CNR	Canadian National Railway
Consumers' Gas	The Consumers' Gas Company Ltd.
East Line Facilities	Ottawa East line and Ottawa Gate Station Facilities of Consumers' Gas
Gazifère	Gazifère Inc.
Gazifère distribution system	the gas pipeline system owned and operated by Gazifère located in the Outaouais region of western Québec
Gazifère line	the line proposed to be constructed and operated by Gazifère commencing at the Gatineau Gate Station
kPa	kilopascals
MOP	maximum operating pressure
Niagara Gas	Niagara Gas Transmission Limited
Niagara line	the 10.5 kilometre line commencing at the Blackburn bypass and ending at Gatineau Gate proposed by Niagara Gas
Ontario	Attorney General of Ontario and the Minister of Environment and Energy for Ontario
Ottawa distribution system	the gas pipeline system owned and operated by Consumers' Gas located in the greater Ottawa area
Ottawa East line	the line owned and operated by Consumers' Gas and located between the Ottawa Gate Station and the Blackburn Hamlet bypass
Ottawa North line	the line extending north from the Ottawa Gate Station to the St. Laurent Control Station
Régie	Régie du gaz naturel
St. Laurent pipeline	this pipeline connects with the Ottawa North line at the St. Laurent Control Station and then extends north, connecting to the Rockcliffe pipeline

TransCanada

TransCanada PipeLines Limited

TransGas

TransGas Limited

WBI

WBI Canadian Pipeline, Ltd.

Recital and Submissions

IN THE MATTER OF the *National Energy Board Act* (the "Act");

AND IN THE MATTER OF an application dated November 1993 by Niagara Gas Transmission Limited under section 58 of the Act in respect of an interprovincial pipeline proposed to be constructed across the Ottawa River;

AND IN THE MATTER OF a Notice of Constitutional Question issued by the National Energy Board and its letter of 19 May 1994 setting out the Statement of Facts with respect to said question;

AND IN THE MATTER OF the decision set out in a letter dated 16 December 1994 of the National Energy Board that it would not proceed with the jurisdictional question;

AND IN THE MATTER OF the request by The Consumers' Gas Company Ltd. dated 21 July 1995 to proceed with a decision on the jurisdictional question;

CONSIDERED at Calgary, Alberta on the 7th day of September 1995.

BEFORE:

R. Priddle	Chairman
K.W. Vollman	Vice Chairman
R. Illing	Member
A. Côté-Verhaaf	Member
R.L. Andrew	Member
J.A. Snider	Member

SUBMITTORS:

The Consumers' Gas Company Ltd.

TransGas Limited

Attorney General of Ontario and
the Minister of Environment and Energy for Ontario

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Chapter 1

Background

In November 1993, the National Energy Board (the "Board") received an application from Niagara Gas Transmission Limited ("Niagara Gas") under section 58 of the *National Energy Board Act* (the "Act") in respect of an interprovincial pipeline (the "Niagara line") proposed to be constructed across the Ottawa River. The Board found that a consideration of the Niagara Gas application raised a question of jurisdiction over the upstream facilities of The Consumers' Gas Company Ltd. ("Consumers' Gas") that would link the proposed Niagara line with TransCanada PipeLines Limited's ("TransCanada") transmission line at Consumers' Gas Ottawa Gate station. On 19 May 1994 the Board approved the application of Niagara Gas and at the same time invited submissions on the question of "whether the Ottawa East line, once connected to the Niagara line approved by Order XG-N6-22-94 is subject to federal jurisdiction." A Statement of Facts was provided and a Notice of Constitutional Question was served on the provincial and federal Attorneys General.

Submissions were received from Consumers' Gas, the Province of Ontario and TransGas Limited ("TransGas"). In addition, a letter was received from the Alberta Department of Energy which expressed concern about the suggestion that the upstream facilities could be subject to federal jurisdiction, although it offered no submissions on the issue.

The proposed Niagara line was intended to connect at its downstream end with a new line that Gazifère Inc. ("Gazifère") planned to construct to expand its distribution system. By letter dated 16 December 1994, the Board advised parties that it would take no decision on the jurisdictional question until the construction of Gazifère's new line had been approved by the Québec regulatory authority, the Régie du gaz naturel (the "Régie"). On 5 July 1995 the Régie issued the requisite authorization and a request was subsequently received from Consumers' Gas to proceed with a decision on the jurisdictional question. Consumers' Gas advised that, acting on behalf of Niagara Gas, it was proceeding to order pipe and planned to commence construction of the proposed facilities in September 1995. In its request, Consumers' Gas confirmed that there had been no material change to the constitutional facts set out in the Statement of Facts attached as Appendix "A" to the letter of the Board dated 19 May 1994, as supplemented by the facts contained in Consumers' Gas written submission dated 30 June 1994. Consumers' Gas did note, however, that IPL Energy Inc. had completed the purchase of the shares of Consumers' Gas and of the parent company of both Niagara Gas and Gazifère, after the filing of the written submission.

Consumers' Gas request dated 21 July 1995 was copied to all persons on the List of Interested Parties. No correspondence, other than a letter from the counsel for Gazifère has been received.

Chapter 2

Facts

Consumers' Gas owns and operates a gas pipeline system located in south-central and eastern Ontario, including a distribution network in the greater Ottawa area (the "Ottawa distribution system"). Gazifère owns and operates a gas pipeline system located in the Outaouais region of western Québec (the "Gazifère distribution system"), which includes the cities of Hull, Gatineau, and Alymer. In addition to the proposed Niagara line, Niagara Gas owns and operates a pipeline known as the Rockcliffe pipeline which extends across the Ottawa River and links the Ottawa distribution system and the Gazifère distribution system.

Attached as Appendix I is a schematic provided by Consumers' Gas of the corporate relationships between these companies. From the schematic, it can be seen that British Gas Holdings Canada Limited owned 85 percent of the common shares of Consumers' Gas and, through a holding company, 100 percent of the common shares of Niagara and Gazifère. This reorganization occurred in January of 1992 to separate out the Ontario utility assets of Consumers' Gas from those not regulated by the Ontario Energy Board. As noted by Consumers' Gas in its July 1995 correspondence, IPL Energy Inc. completed the purchase of the shares of Consumers' Gas and of the parent company of both Niagara Gas and Gazifère. Consumers' Gas, Niagara Gas and Gazifère are affiliated companies and this relationship is acknowledged in the Transportation Service Agreement between Niagara Gas and Gazifère dated 1 October 1991, filed as part of the application of Niagara Gas for the Niagara line.

Niagara Gas has the approval of the National Energy Board under section 58 of the Act, to construct and operate the Niagara line, a 10.5 kilometre line between the Consumers' Gas Ottawa East line ("Ottawa East line"), an operating pipeline, and the proposed Gazifère line ("Gazifère line") in Québec. The purpose of the Niagara line is to supply gas to Gazifère so that it may meet the needs of residential, commercial and industrial markets by extending its distribution network into a new area.

The gas destined for Gazifère will flow from the federally regulated TransCanada transmission line, through the TransCanada meter station and then through 43 metres of TransCanada pipeline, to the Consumers' Gas Ottawa Gate Station property line. It will then be transmitted through pipe owned by Consumers' Gas into the Ottawa Gate Station. At the Ottawa Gate Station, heating, metering and odourant facilities are used prior to the gas being fed into three lines, known as the Ottawa North, the Ottawa East and the Ottawa South pipelines. These three lines are part of Consumers' Gas Ottawa distribution system.

The Ottawa East line is a pipe of 406.4 mm diameter with a maximum operating pressure ("MOP") of 4 500 kilopascals ("kPa") and with its own pressure regulating facilities. It extends from the Ottawa Gate Station to a point of interconnection with another distribution pipeline known as the Innes Road pipeline, at the Blackburn Hamlet bypass. Along its route, the Ottawa East pipeline is also connected to two distribution pipelines: a short mainline that extends south to provide service to one customer and a grid mainline known as the Anderson Road pipeline that extends north to another interconnection with the Innes Road pipeline. The Ottawa East line will tie into the Niagara line at the Blackburn Hamlet bypass tie-in. The Innes Road pipeline, and through it, the Ottawa North

pipeline also connect at the Blackburn Hamlet bypass. The Niagara line then crosses the Ottawa River and ties into the proposed Gazifère line at the Gatineau Gate Station in Québec. Attached as Appendix II is a map of these facilities.

Due to the configuration of the Consumers' Gas pipeline, the Niagara line is capable of being served by either the Ottawa East line or the Ottawa North line. It is intended that the Ottawa East line will be the source of supply and the latter would only be used as a backup in the case of planned or unplanned outages. The Niagara line will have a diameter of 508 mm and an MOP of 4 960 kPa.

The Ontario Energy Board effectively authorized Consumers' Gas to construct the Ottawa East line by order PL-61 issued on 25 May 1988. It was constructed to reinforce the Ottawa distribution system, in particular the Innes Road pipeline and, through it, the Ottawa North pipeline. The other purposes for which it was constructed were to provide a second source of supply to the City of Gloucester and the Township of Cumberland and to serve directly individual customers located along the route of the pipeline.

Niagara Gas advised the Board that the use of the Ottawa East line to supply the Niagara line was not intended to continue throughout the entire 20-year forecast period. Niagara Gas intends to build additional upstream facilities to supply the Niagara line. Those facilities would be directly connected to the Ottawa Gate Station and would be the subject of an application to the Board. No detailed design for those proposed facilities has been prepared and Niagara Gas does not intend to proceed until there is more certainty with respect to downstream markets.

The throughput capability of the Ottawa East line was estimated to be 260 10^3m^3 of gas an hour of which approximately 190 10^3m^3 hour would be available at the Blackburn Hamlet bypass tie-in. Of the 190 10^3m^3 hour, 124 10^3m^3 hour would be available to the approved Niagara line. Niagara Gas advised the Board that, due to a delay in the construction of a proposed cogeneration plant to be supplied by Gazifère, it is likely that 152 10^3m^3 hour would move through the Ottawa East line from the Ottawa Gate Station. Over the Niagara line, the estimated throughput would be 54 10^3m^3 hour. It was therefore estimated, that of a throughput of 152 10^3m^3 hour on the Ottawa East line, 54 10^3m^3 hour would actually be for interprovincial movement.

There is no compression provided on the Ottawa East line nor will any be provided on the Niagara line. The nearest upstream compression comes from the TransCanada North Bay shortcut near Richmond, Ontario, at 6 895 kPa. All of the gas to be transported over the Ottawa East line and the Niagara line comes from TransCanada. Incoming gas from TransCanada is metered at the Ottawa Gate Station. There is no separate metering for the Ottawa East line nor is there further metering on the line until the end of Niagara line, at the Gatineau Gate Station where the Niagara line connects to the Gazifère line.

The Ottawa East line has its own pressure regulating facilities located at the Ottawa Gate Station. There are no other upstream facilities on the Ottawa East line to regulate or increase the pressure to the approved Niagara line. As a result, compression upstream from TransCanada is regulated at the Ottawa Gate Station and is not regulated again, unless and until distribution occurs on the Gazifère line.

Five valves are shown on the Ottawa East line. That line can be closed off downstream of the Ottawa Gate Station and upstream of the Blackburn Hamlet bypass tie-in. Three valves are shown on the

approved Niagara line. It can be closed off shortly after the Blackburn Hamlet bypass tie-in, on the Ontario side of the Ottawa River, and on the Québec side of the Ottawa River just before the approved Gatineau Gate station.

An agreement called the Rate 200 Agreement between Consumers' Gas and Gazifère contemplates both sales and transportation services on the Ottawa Distribution System, together with load balancing. Rate 200 is a wholesale service available to distributors that wish to ship gas across the Consumers' Gas System in Ontario, for ultimate delivery outside of the franchise area of Consumers' Gas. To date, Gazifère has only utilized sales service and expects to continue to do so.

Consumers' Gas makes gas supply arrangements in order to meet the daily, seasonal and annual demand in Gazifère's service area as well as its own service areas in Ontario. These arrangements include gas supply per se, transportation services, storage and peaking services, and include buy-sell arrangements with direct purchase customers of its own and of Gazifère. As a result, Gazifère is a wholesale customer of Consumers' Gas and as such purchases all of the gas supply required by its customers (including direct purchase customers) from Consumers' Gas.

Deliveries under the Rate 200 Agreement include gas that Consumers' Gas purchases in connection with buy-sell arrangements with customers of Gazifère. The buy-sell gas is delivered in connection with three-party arrangements involving a customer of Gazifère, Consumers' Gas and Gazifère. A Gazifère customer with a direct purchase buy-sell arrangement sells gas in either Western Canada or Ontario to Consumers' Gas, which sells an equivalent volume on an annual basis to Gazifère under the Rate 200 Agreement. This gas is sold from Consumers' Gas' portfolio of system supply contracts, including the buy-sell agreement. Gazifère, in turn, sells a corresponding annual volume as sales service to the customer from the deliveries under the Rate 200 Agreement. However, if a customer wanted to maintain title to gas purchased under a direct purchase arrangement, the customer could request Gazifère, on its behalf, to use the transportation service under the Rate 200 Agreement with Consumers' Gas and under Gazifère's Service Agreement with Niagara Gas, in order to deliver the gas into the Gazifère Distribution System.

When Gazifère buys gas from Consumers' Gas, it is delivered at the Blackburn Hamlet bypass. When Gazifère buys gas as part of a buy-sell for a customer, it may take delivery at the Ottawa Gate Station. To summarize, movement of gas interprovincially over the Niagara line can occur in a number of ways. There can be a western buy-sell by a Gazifère customer, an Ontario buy-sell by the customer or a sale by Gazifère to the customer in Québec.

There are no transportation arrangements between Consumers' Gas and Niagara Gas for movement on the Niagara line. All such arrangements are between Gazifère and Niagara Gas and Niagara Gas provides transportation only; that is, it does not sell gas to Gazifère at the delivery point.

In response to Board Information Request No. 1, Niagara Gas had stated that Consumers' Gas had stated that it would operate the Niagara line on behalf of Niagara Gas and there had never been a formal operating agreement between the two companies. In its response to Board Information Request No. 53, Niagara Gas had advised that there was a management service agreement which "may involve operations and maintenance services for the approved facilities."

The Board sought clarification of this apparent discrepancy and Consumers' Gas advised the Board that there was no formal operating agreement between it and Niagara Gas in the sense usually

conveyed by that term; that is, an agreement setting out in detail the specific powers and duties of the operator. There is a management services agreement pursuant to which Consumers' Gas provides Niagara Gas with "such services as may be required or requested from time to time" and agreed to by Consumers' Gas. Depending on the scope of any such request, the services "may involve operations and maintenance services for the proposed facilities."

Chapter 3

Summary of Submissions

Consumers' Gas submitted that the Ottawa Gate Station and the Ottawa East pipeline would attract jurisdiction if, in and of themselves, they comprise a federal work or they are used in a way that is essentially interprovincial in nature (a federal undertaking). It was the view of Consumers' Gas that neither was the case in this instance. It submitted that both the station and the pipeline are integral parts of the Ottawa distribution system, which is located entirely within the boundaries of Ontario, and as such, are *prima facie* local works. Their mere physical connection was not sufficient to bring them within the jurisdiction of Parliament. The company submitted that its primary undertaking does not extend beyond the use of the Ottawa distribution system for local purposes. It delivers gas to retail customers located in the greater Ottawa area and to Gazifère, as a wholesale customer, at the inlet of the proposed Niagara facilities.

Furthermore, Consumers' Gas submitted, to the extent that the functions that it performs for Niagara Gas as the operator of its interprovincial facilities can be seen to involve an interprovincial undertaking, it is so clearly a secondary undertaking of Consumers' Gas as to represent a separate undertaking for constitutional purposes.

Consumers' Gas submitted that the Ottawa Gate Station and the Ottawa East line would also attract federal jurisdiction if they are integral to the Niagara line as a federal work, or if their use is integral to the use of the Niagara line. Consumers' Gas was of the view that neither was the case in this instance.

The core federal work or undertaking must be, Consumers' Gas submitted, dependent to a significant degree on the local work or undertaking for there to be federal jurisdiction over the latter. The normal or habitual operation of the local work or undertaking must be considered without regard to exceptional or casual factors. Consumers' Gas submitted that the wholesale service to Gazifère would be incidental or collateral to the primary purpose of the Ottawa Gate Station or the Ottawa East line. Consumers' Gas submitted that those facilities would continue to be operated to serve an overwhelmingly local purpose.

Relying on the Québec Court of Appeal decision in *Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications)*,¹ Consumers' Gas submitted that the major part of a local undertaking's normal and usual activities must be done for the federal undertaking if it is to be subject to federal jurisdiction. As the primary undertaking of Consumers' Gas does not involve interprovincial service, it remains a local undertaking subject to provincial jurisdiction. Consumers' Gas stated that, furthermore, use of the Ottawa East line to deliver gas to the proposed Niagara line represents a connection at the end of a local transportation process.

¹[1992] 99 D.L.R. (4th) 241 at 249, affirmed [1994] 1 S.C.R. 878.

Consumers' Gas pointed out that in the Board's Reasons for Decision in GH-R-1-93, the Board found that a new pipeline owned by TransGas that would be connected to an international pipeline to be owned by WBI Canadian Pipeline, Ltd. ("WBI") could not be viewed as a connection at the end of a local transportation process. Consumers' Gas noted that the Board commented in that decision that this may not be the case if the new TransGas line connected upstream with the TransGas system.

It was the submission of Consumers' Gas that the Board appeared prepared to distinguish the situation where a pipeline with a predominant intraprovincial purpose connects with a pipeline with a predominant interprovincial purpose, in which event the former can properly be viewed as a connection at the end of the local transportation process. Similarly, the Ottawa Gate Station and the Ottawa East pipeline are overwhelming local or intraprovincial in nature. They are integral components of the Ottawa distribution system and, as such, have no distinctive predominant purpose of their own.

Lastly, Consumers' Gas notes that the "vital, integral or essential" test should not be based on gas supply considerations as the logical extension of that interpretation would result in all upstream intraprovincial pipelines falling within the Board's jurisdiction.

3.1 TransGas Limited

TransGas submitted that the issue in this case was whether the Ottawa East line is integral to the function of the Niagara line, once the two are connected. Federal jurisdiction depends upon a finding that the regulation of the subject matter in question is integral to the core federal work or undertaking, not that the putative provincial work or undertaking itself is integral to the core federal work or undertaking. TransGas submitted that this is a very important distinction which provides a rational basis for reconciling the many diverse decisions from the Courts respecting the constitutional division of powers.

The purpose of the line and a characterization of the undertaking must occur, TransGas stated, to determine the constitutional division of powers. The appraisal must be of the entire undertaking and not merely of its constituent elements. The mere fact of physical interconnection with a federally regulated pipeline should not be sufficient to trigger federal jurisdiction. If the primary purpose of the line is intraprovincial, the fact that the ability to conduct interprovincial business on the pipeline is possible should not be conclusive to bring the line within the realm of federal jurisdiction. TransGas took the view that there has to be a point at which a pipeline transporting gas for international purposes, a federally regulated pipeline, receives its supply of gas without adversely affecting the jurisdictional status of upstream facilities to which it is connected. Otherwise, there would be few, if any, pipelines and facilities provincially regulated.

In summary, TransGas submitted that the Board should find that the Ottawa East line, once connected to the Niagara Gas pipeline, is not subject to federal jurisdiction.

3.2 Attorney General of Ontario and the Minister of Environment and Energy for Ontario

The Attorney General of Ontario and the Minister of Environment and Energy for Ontario ("Ontario") submitted that the facilities are *prima facie* within provincial jurisdiction. Federal jurisdiction could be established on only one of two grounds. Either the local work or undertaking itself connects Ontario with Québec or it is an integral part of a federal work or undertaking. Ontario submitted that the pipeline in issue is an integral part of Consumers' Gas' local distribution company. Furthermore, the supply of gas from the Ottawa East line to the Niagara line is intended to be temporary in nature. Ontario also relied upon the fact that the Ontario East line has its own pressure relating facilities, can be closed off by valves located downstream of the Ottawa Gate Station and just upstream of the Blackburn Hamlet bypass tie-in and capacity may be provided to the Niagara line by the Ottawa North line. Ontario submitted that the physical connection itself is insufficient to establish jurisdiction.

Next, Ontario considered whether there exists between Niagara Gas and Consumers' Gas "a nexus sufficient to justify placing the latter within the federal jurisdiction." Ontario submitted that the fact that several entities involved in the transport of natural gas fall under federal jurisdiction--TransCanada and the Niagara line--cannot on its own serve to bring everything connected with it--Consumers' Gas and the Ottawa East line--under federal jurisdiction. Furthermore, in considering the functional integration test, Ontario submitted that the Consumers' Gas function is in no way integrated with the Niagara function. The function of the latter is limited to the interprovincial transmission of gas and has nothing to do with the operation of Consumers' Gas. The function of Consumers' Gas is the local distribution of gas; its temporary use of excess capacity on its local distribution system for the delivery of gas to Niagara is incidental. As a result, Ontario submitted that there is little more than a physical connection and a mutually-beneficial commercial relationship between Consumers' Gas and the proposed Niagara line and something more, it said, is necessary for a finding of federal jurisdiction.

Finally, Ontario submitted that the dependency relationship had to be permanent and, in this case, the Ottawa East line was intended to be only a temporary supply of excess capacity. Therefore, Ontario submitted that the Consumers' Gas Ottawa East line is not a federal work or undertaking nor is it an integral part of a federal work or undertaking according to the tests in the relevant jurisprudence.

Chapter 4

Views of the Board

The federal power over pipelines is found in the exceptions to the provincial powers set out in section 92(10)(a) of the *Constitution Act, 1867*. The federal government holds the exclusive power to make laws in relation to:

lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with another or others of the provinces, or extending beyond the limits of the province.

The Board has considered the question of constitutional jurisdiction over pipeline facilities on a number of occasions and is of the view that each case must be carefully considered on its own facts. As pointed out by Chief Justice Dickson in the *Alberta Government Telephones v. C.R.T.C.* decision, each case is dependent on its facts and other cases are useful only as analogies.²

In considering whether a particular work or undertaking comes within section 92(10)(a) of the Constitution and therefore within federal jurisdiction, the words of Chief Justice Dickson in the recent *U.T.U. v. Central Western Railway* case³ are of assistance:

There are two ways in which Central Western may be found to fall within federal jurisdiction... First, it may be seen as an interprovincial railway and therefore come under section 92(10)(a) as a federal work or undertaking. Second, if the Appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under section 92(10)(a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is itself an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking.⁴

Chief Justice Dickson stated that, to answer the jurisdictional question, the "physical and operational character of the railway must be examined"⁵, and he outlined the tests to be used for the determination of constitutional classification. As the majority of the Board noted when considering the *Central*

²[1989] 2 S.C.R. 225 at 258 [hereinafter *AGT* cited to S.C.R.].

³[1990] 3 S.C.R. 1112 [hereinafter *Central Western* cited to S.C.R.].

⁴*Ibid.* at 1124-25.

⁵*Ibid.* at 1119.

Western case in the *Altamont Gas Transmission Canada Limited* decision⁶, the constitutional classification of a pipeline is determined on the basis of a consideration of the particular constitutional facts concerning the line as related to physical connection, effective ownership, control, and general operational and functional integration.

It is clear that the Board will acquire jurisdiction over a pipeline if it connects one province with another or connects a province with a foreign country. The mere physical connection though, of an apparently provincial line with a federal line, may not be enough to bring both lines under federal jurisdiction. In the *Central Western* case, Dickson C.J. considered this issue in the context of railway lines, stating⁷ that:

Railways, by their nature, form a network across provincial and national boundaries. As a consequence, purely local railways may very well "touch", either directly or indirectly, upon a federally regulated work or undertaking. That fact alone, however, cannot reasonably be sufficient to turn the local railway into an interprovincial work or undertaking within the meaning of section 92(10)(a) of the *Constitution Act, 1867*. Furthermore, if the physical connection between the rail lines were a sufficient basis for federal jurisdiction, it would be difficult to envision a rail line that could be provincial in nature: most rail lines located within a province do connect eventually with interprovincial lines.⁸

Where there is not a physical connection sufficient to establish a work as one subject to federal jurisdiction, such jurisdiction can result in any event if the provincial work is vital, integral or essential to the federal work or undertaking. This is essentially a factual determination.⁹

As found by Chief Justice Dickson, the physical and operational character of the pipeline must be examined.¹⁰ One example of an integral connection is where the federal work controls the operations of the provincial work. For example, in *Luscar Collieries Ltd. v. McDonald*¹¹, the judicial committee of the Privy Council found that a provincially authorized railway located entirely within the borders of a province would come under federal authority if a railway subject to federal jurisdiction assumed operational control over it pursuant to an operating agreement. In this way, the provincial line could be considered to be part of a continuous system of railways operated together.

⁶National Energy Board GHW-1-92 (February 1993) Reasons for Decision at 19.

⁷*Central Western*, *supra*, note 3 at 1129.

⁸See also *City of Montreal v. Montreal Street Railway Co.*, [1912] A.C. 333 (P.C.); *B.C. Electric Railway Company v. Canadian National Railways*, [1932] S.C.R. 161; [1932] 2 D.L.R. 728 (sub. nom. *North Fraser Harbour Commissioners v. B.C. Electric Railway Company*) 39 C.R.C. 215.

⁹Dickson C.J. in *AGT*, *supra*, note 2 at 258. See also Mahoney, J.A. in *Dome Petroleum Ltd. v. National Energy Board*, [1987] 73 N.R. 135 at 138 [hereinafter *Dome* cited to N.R.].

¹⁰*Central Western*, *supra*, note 3 at 1119.

¹¹[1927] 4 D.L.R. 85 [hereinafter *Luscar* cited to D.L.R.].

The issue of control in the context of a pipeline was considered by the Federal Court of Appeal in the case of *Reference Re: National Energy Board Act*¹² (the "Cyanamid case"). In that case, the interprovincial pipeline of TransCanada would have been physically connected to the proposed, ostensibly provincial pipeline owned by Cyanamid Canada Limited. In light of the limited control that would be exercised by TransCanada over the proposed Cyanamid line, the Court found that the latter would not be subject to federal jurisdiction. Of primary importance was the fact that the proposed pipeline was not necessary for the operation of the interprovincial transmission company. It is worth noting that MacGuigan J.A.¹³ suggested that if TransCanada had an agreement to operate the proposed pipeline, it would then fall within federal jurisdiction on the basis of the *Luscar* case.

The Courts have also considered whether a logical nexus exists between a federal work or undertaking and an ostensibly provincial work or undertaking. Mr. Justice Beetz of the Supreme Court of Canada considered such a situation in the case of *Construction Montcalm Inc. v. Commission du salaire minimum*¹⁴ where he stated that:¹⁵

The question whether an undertaking, service or business is a federal one depends on the nature of its operation... [I]n order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a "going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

It is useful therefore to analyze the nature or operation or "purpose" of the work or undertaking. It should be noted that while ownership is not determinative, the effect that ownership or a change in ownership would have on the operation of a line can be of importance. This was highlighted in *Central Western* when the change in ownership caused a change in operation. As a result, the line was found to be within provincial jurisdiction.¹⁶

Dickson C.J. noted in the *Central Western* case that "if work occurs simultaneously between two enterprises, functional integration may exist." In that case, the necessary functional integration did not exist because the interaction between Central Western and Canadian National Railway ("CNR") occurred only sporadically when the interchange of cars was necessary. As a result, he found that the transfer could be seen as a connection at the end of a local transportation process.¹⁷ Furthermore, he came to the conclusion that the Central Western Railway was not vital or essential to the operations of

¹²[1987] 48 D.L.R. (4th) 596.

¹³*Ibid.* at 610.

¹⁴[1979] 1 S.C.R. 754 [hereinafter *Montcalm* cited to S.C.R.]; 25 N.R. 1. See also, *Northern Telecom Ltd. v. Communications Workers of Canada et al* (No. 1), [1980] 1 S.C.R. 115 [hereinafter *Northern Telecom, No. 1* cited to S.C.R.]; *Northern Telecom Canada Ltd. et al v. Communication Workers of Canada et al* (No. 2), [1983] 147 D.L.R. (3d) 1 (S.C.C.) [hereinafter *Northern Telecom, No. 2* cited to D.L.R.].

¹⁵*Montcalm, ibid.* at 769.

¹⁶*Central Western, supra*, note 3 at 1131.

¹⁷*Central Western, supra*, note 3 at 1141.

CNR in that "the effective performance of CNR's obligation as a national railway is not contingent upon the services of the appellant". He went on to state that "[t]hese factors point strongly, almost decisively against a finding of federal jurisdiction over the employees."

To summarize, the constitutional classification of a pipeline is determined on the basis of a consideration of the particular constitutional facts concerning that pipeline as related to physical connection, effective ownership, control, and general operational and functional integration. These are the factors to be considered when trying to determine whether the line is a federal work or undertaking or integral to a federal work or undertaking.

In deciding the constitutional classification of the Ottawa East line, the Board will utilize the analysis from the *Central Western* case and apply it to the particular facts in this case. The Board will first consider whether the Ottawa East line is a federal work or undertaking. Second, it will consider whether the line is integral to an existing federal work or undertaking. In carrying out this analysis the Board will take into account the above described factors which have been found significant in the relevant jurisprudence.

4.1 Is the Ottawa East line a federal work or undertaking?

The first question is whether the Ottawa East line can be characterized as a federal work or undertaking. To decide this question, the physical connection test must be considered.

The fact that the Consumers' Gas Ottawa East line touches and connects with the TransCanada line, a federal line, is not necessarily determinative in itself.¹⁸ In this case though, the Ottawa East line will link two federal lines. Although there have been no similar pipeline situations before the Courts on a question of constitutional classification, the mere fact that a railway line is a "link in the chain" of federal lines has been held not to be sufficient, in itself, to decide the issue of jurisdiction.¹⁹ More is needed to demonstrate that a line is a federal work or undertaking. The facts related to the use of the line must be considered.

In this particular situation, the Board is persuaded by the submissions of Consumers' Gas that the principal use of the Ottawa East line is to provide gas to retail customers and deliver gas to Gazifère, as a wholesale customer, at the inlet of the proposed Niagara facilities. As a result, the Board finds that the first question posed in *Central Western* must be answered in the negative and the Ottawa East line is not itself a federal work or undertaking. Therefore, the second question must be considered.

4.2 Is the Ottawa East line an integral part of a federal work or undertaking?

While it is clear that the Ottawa East line has been operated as an intraprovincial distribution line, it is possible that the addition of the applied-for facilities could change its character. The Courts have held

¹⁸*Central Western*, *supra*, note 3 at 1130.

¹⁹*B.C. Electric Railway Company v. Canadian National Railways*, [1932] S.C.R. 161 at 170. It should be noted that one end of the chain in that case was a railway declared to be for the general advantage of Canada under s. 92(10)(c) of the Constitution, not an interprovincial railway.

that the nature of an undertaking can change, and an undertaking that was intraprovincial in nature can, over time, become an interprovincial undertaking.²⁰ Further, both the Supreme Court of Canada²¹ and the Privy Council²² have held that the existence of intraprovincial traffic is not necessarily a determinative factor if there is also interprovincial or international traffic.

The test used to decide if a work or undertaking is an integral part of a federal work or undertaking is usually described as the "vital, integral and essential" test. The Court looks at the nature of the relationship between the core federal work or undertaking and the enterprise in question²³ and seeks to determine whether operational or functional integration occurs.

In this case, the core federal work is the Niagara line. The question to be considered is whether the Ottawa East line is vital, integral or essential to the Niagara line.

In *Central Western*, the Court found that the most important factor in determining whether the intraprovincial work or undertaking was vital, essential or integral to the interprovincial work or undertaking was whether the core federal undertaking was dependent on the undertaking in question. In this case, no supply to the Niagara line would occur without the Ottawa East line. It provides the necessary transportation to move the gas from the interprovincial line, the TransCanada pipeline, to another interprovincial line, the Niagara line. Alone, this may not be enough to characterize the Ottawa East line as vital, integral or essential to the Niagara line. The functional and operational integration of the two lines will also be considered.

Consumers' Gas will provide the necessary heating and odourant facilities at the Ottawa Gate Station. No such facilities are available on the Niagara line. Metering occurs after the gas leaves the TransCanada pipeline and at the Ottawa Gate Station. No metering occurs on the Niagara line to measure the product entering that line. Metering occurs at the Gatineau Gate Station when the product enters the Gazifère line. Compression, although initiated on the TransCanada system, will be regulated at the Ottawa Gate Station and then provided to the Niagara line via the Consumers' Ottawa East line. Consumers' Gas will control load balancing on the Consumers' Gas, Niagara Gas and Gazifère lines.

The Niagara line is also dependent on the commercial arrangements made by Gazifère and Consumers' Gas as it is solely a transportation entity and contracts only with Gazifère for the provision of its transportation services. It does not buy or sell gas in its own right but moves gas as contracted with Gazifère and as dictated by Consumers' Gas. It is unable to move gas on its own and is entirely dependent on the arrangements made between its two affiliated companies. In addition to this integration and resulting dependence, it is noteworthy that the Niagara line will be constructed, operated and maintained by Consumers' Gas.

The fact that Consumers' Gas, Niagara and Gazifère are separate companies, has been held by the Courts not to be determinative of the issue. In the case of *Alberta Government Telephones v.*

²⁰AGT, *supra*, note 2 and *Dome*, *supra*, note 9 at 138-39.

²¹AGT, *supra*, note 2.

²²*A-G Ontario v. Winner*, [1954] A.C. 541.

²³*Central Western*, *supra*, note 3 at 1125 et. seq.

C.R.T.C., the Court noted that separate corporate ownership of intraprovincial assets was not conclusive.²⁴ The crucial question, said the Court in *Central Western*, was whether "the work in question can properly be described, with regard to its operations, as being interprovincial."²⁵ In *Central Western*, the necessary functional integration between the CNR and Central Western was not sufficient. In the *AGT* case, AGT's involvement in Telecom Canada was sufficient to achieve the necessary integration. Corporate interrelationships can be a relevant consideration. As Chief Justice Dickson noted with approval in the *AGT* case:²⁶

A transportation or communication undertaking is a possible corporate activity but it may or may not be segregated from the total corporate enterprise or it may even be larger in scope than a single corporate enterprise. To determine questions of this nature corporate objects have a certain relevance. *But of primary concern is the integration of the various corporate activities in practice (including the corporate organizations themselves if more than one is involved) and their inherent interdependence.* [emphasis added by the Court]

In the instant case, the reorganization of Consumers' assets so that those to be regulated by tribunals other than the Ontario Energy Board are held outside of Consumers' Gas is, in the view of the Board, of little relevance. The Courts have found that they will not permit a jurisdictional question to turn on "technical, legal niceties of the corporate structure..."²⁷ As Dickson C.J. stated, "constitutional jurisdiction should not vary according to the corporate form involved."²⁸

The Board finds that in this case the separate corporate structures, with a shared corporate parent, have no affect on the view that the Ottawa East line is integral to the federal line.

The evidence indicates that supply is intended to come primarily from the Ottawa East line with the Ottawa North line to be used only in cases of outages. Does this possible occasional use of the Ottawa North line result in the Ottawa East line not meeting the "vital, integral and essential" test?

As earlier noted in *Construction Montcalm Inc. v. Commission du salaire minimum*,²⁹ Mr. Justice Beetz provided guidance on analyzing the activities of a work or undertaking when he stated that "one must look at the normal or habitual activities of the business as those of a 'going concern', without regard for exceptional or casual factors." The answers to the Board's Information Requests provided by Niagara indicate that the use of the Ottawa North line for supply will be something that occurs on a casual or exceptional basis. Therefore, in the result, the Board is of the view that the fact that gas will occasionally be supplied from the Ottawa North line is not relevant to this jurisdictional analysis.

²⁴ *AGT*, *supra*, note 2 at 263-65.

²⁵ *Central Western*, *supra*, note 3 at 1131.

²⁶ *AGT*, *supra*, note 2 at 264 quoting from *Northern Telecom, No. 1*, *supra*, note 14 at 134.

²⁷ *Ibid.* at 30 quoting from *Re Aero Transport Co.*, [1971] 1 CLRBR 29 at 34-35 (British Columbia Labour Relations Board).

²⁸ *Ibid.* at 264.

²⁹ *Montcalm*, *supra*, note 14 at 769.

Consumers' Gas submitted that the use of the Ottawa East line to supply gas for interprovincial traffic was on a casual or occasional basis and only for a temporary period of time and, therefore, the line should be subject to provincial jurisdiction. The Board finds that the use of the Ottawa East line to transmit gas for interprovincial movement will be regular and continuous. The dependence of Niagara Gas on the services provided by the Ottawa East line and Consumers' Gas is expected to continue until markets require the construction of a new line to supply the Niagara line.³⁰ In the Board's view, the use of the Ottawa East line to transmit gas destined for interprovincial movement cannot be described as casual or occasional.

Consumers' Gas referred to the Board's views in the decision on the TransGas jurisdictional question. The Board is of the view that its obiter statement in its decision in GH-R-1-93 should not be seen as necessarily applicable to this case.

Similarly, the case law touched upon by Consumers' Gas by way of a reference to an obiter statement in *Attorney-General of Québec et al v. Téléphone Guèvremont Inc.*, [*Letter Carrier's Union of Canada v. Canadian Union of Postal Workers*]³¹; *Montcalm Construction Inc. v. Minimum Wage Commission*;³² and *Northern Telecom Canada Ltd. v. C.W.C.*³³ is, in the Board's view, distinguishable. Consumers' Gas submitted that these cases state that a major part of a local work or undertaking's normal and usual activities must be done for the federal work or undertaking if it is to be found integral to that federal work or undertaking. The analysis and findings in those cases are relevant to their particular facts which were related to the characterization of an employee group that worked at times on a federal work or undertaking. As the Board and the Courts have noted, each case must be considered on its own particular facts. The Board finds the framework for analysis of the classification of a work or undertaking provided in *Central Western* to be more useful in the present fact situation. Furthermore, the Board is of the view that a finding that the Ottawa East line is integral to a federal work or undertaking should not be based solely on the percentage of interprovincial gas transmitted, nor do the cases cited stand for such a proposition. To make a finding on that basis would be to unduly simplify the constitutional principles that have developed in relation to the classification of works and undertakings in relation to section 92(10)(a).

TransGas took the view that *Central Western* requires that regulation of the Ottawa East line must be found to be integral to the Niagara line. In the Board's view, this is not the proper interpretation of Dickson C.J.'s comments at pages 1124-25 of that case. His subsequent analysis does not rely on the necessity of federal regulation of Central Western but rather the requirement that Central Western be functionally and operationally integrated with the CNR.

In *Central Western*, Dickson C.J. found that the necessary integration did not occur and the CNR was not in any way dependent on the services of Central Western. That cannot be said in this case.

³⁰The evidence is that Niagara Gas will apply to the Board for approval of the new line when needed, thereby acknowledging federal jurisdiction over that line.

³¹(1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R. 178, [1974] W.W.R. 452.

³²*Montcalm*, *supra*, note 14.

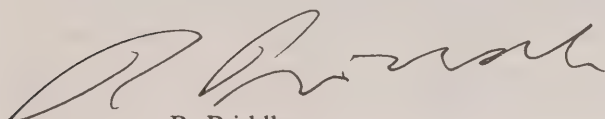
³³*Northern Telecom*, No. 2, *supra*, note 14.

Simply put, the effective performance of the Niagara line is dependent on the many services provided by the Ottawa East line and Consumers' Gas, only one of which is the actual provision of the gas. Once connected, the two lines will be functionally and operationally integrated.

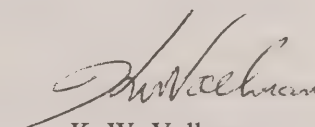
Chapter 5

Disposition

It is the Board's view, based on this analysis, that the Ottawa East line, once connected to the Niagara line, is subject to federal jurisdiction as the vital, integral and essential test has been met. As a result of the nature of the connection of the Ottawa East line to the TransCanada line, federal jurisdiction commences where the TransCanada line connects with the Consumers' Gas line at the property line of the Ottawa Gate Station and includes the Ottawa Gate Station which encompasses all pipelines, facilities and installations within the station's property lines.



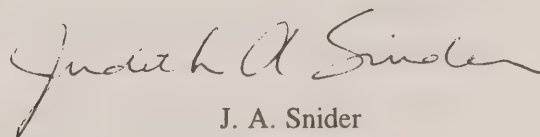
R. Priddle
Chairman



K. W. Vollman
Vice Chairman



A. Côté-Verhaaf
Member



J. A. Snider
Member

Calgary, Alberta
September 1995

Chapter 6

Dissenting Opinion - R. Illing

I am unable to agree with the decision of the majority of the Board in this matter.

The majority decided, and I agree, that the Ottawa East line is not itself a federal work or undertaking, even though it will link two federal pipelines. However, the majority concluded that the Ottawa East line will nevertheless fall under federal jurisdiction once it is connected to the proposed Niagara line because it is vital, integral and essential to the proposed Niagara line under the second test in *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112.

I believe that in arriving at this conclusion the majority has failed to distinguish the *undertaking* carried out by Consumers' Gas from the particular *work*, being the Ottawa East line, which in the view of the majority would fall under federal jurisdiction. Mr. Justice MacGuigan explained this distinction as follows in *National Energy Board (Re)*, [1988] 2 F.C. 196 at 218:

In *Montreal City v. Montreal Street Railway Company*, [1912] A.C. 333 (P.C.), at page 342, works were said to be "physical things, not services." An undertaking, on the other hand, was defined in *Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 (P.C.), at page 315, as "not a physical thing but . . . an arrangement under which of course physical things are used."

Mr. Justice MacGuigan then went on to apply this distinction to the facts of the Cyanamid bypass pipeline that was under consideration in that case:

As a work, the proposed pipeline exists solely within the province of Ontario and, as established by the *B.C. Electric Railway* case [*British Columbia Electric Ry. Co. Ltd. v. Canadian National Ry. Co. et al.*, [1932] S.C.R. 161], mere physical connection to the admittedly interprovincial TCPL work is not sufficient to found federal jurisdiction. If it is to come under 92(10)(a), I believe it must therefore be as an undertaking rather than as a work alone.

The majority acknowledges that the fact that the proposed Niagara line will depend on the Ottawa East line for its gas supply is not enough by itself to characterize the Ottawa East line as vital, integral and essential to the Niagara line; the majority's conclusion is based largely on the functional and operational integration that results from the commercial and operational control of the Niagara line by Consumers' Gas. In my view, these considerations relate to the broader undertaking of Consumers' Gas, not merely the Ottawa East line.

Consumers' Gas, Gazifère and Niagara Gas are affiliated companies which act in concert in providing local gas distribution services in the Ottawa-Hull area. Consumers' Gas provides local distribution services on the Ontario side of the Ottawa River and is regulated under provincial law by the Ontario Energy Board. Gazifère provides local distribution services on the Québec side and is regulated under provincial law by the Régie. Niagara owns and operates the Rockcliffe pipeline which crosses the

Ottawa River and connects the Consumers' Gas and Gazifère systems. At this time, the Rockcliffe pipeline is the sole source of gas supply for Gazifère. Since the Rockcliffe pipeline connects two provinces, it is a "pipeline" within the meaning of the Act and is accordingly regulated by this Board.

The proposed Niagara line will provide reinforcement to the Rockcliffe line and other existing facilities of Consumers' Gas used to deliver gas to Gazifère. The facilities upstream of the Niagara line include not only the Ottawa East line, but also other parts of the Consumers' Gas distribution system: specifically, portions of the Ottawa North line, the Innes Road line and the Anderson Road line. In addition, the upstream facilities include the Ottawa Gate Station, which serves the Ottawa South line as well as the Ottawa North and Ottawa East lines.

Upon completion of the proposed Niagara line, gas will be supplied to Gazifère by Consumers' Gas through the Rockcliffe and Niagara lines. These will be fed by various distribution mains which are integral components of the Consumers' Gas Ottawa distribution system. Gas flows to the Gazifère system are not "dispatched" as would be the case for a transmission line, but depend on the demand on the Gazifère system and the resulting pressure variations on that system.

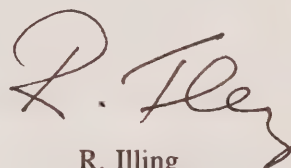
The Consumers' Gas and Gazifère distribution systems are operated in an integrated manner and the Rockcliffe and Niagara lines are simply links between the two systems. In my view, it is inappropriate and legally incorrect to characterize only one element of the Consumers' Gas distribution system—the Ottawa East line—as vital, integral and essential to the Niagara line, and, therefore, subject to federal jurisdiction. Gas flow to the Niagara line will not be exclusively through the Ottawa East line. Although most of the gas will come from the Ottawa East line, the actual flow of gas will depend on the pressure gradients along a number of lines, which will be determined by the size and the location of deliveries off the Ottawa distribution system as a whole. The functional and operational integration which is crucial to the majority's finding therefore relates to the entire Ottawa distribution system and the undertaking of Consumers' Gas with respect to this system, not only the Ottawa East line.

I can see no point in dividing jurisdiction over an integrated system by breaking out one element of it, as the majority proposes. On the contrary, I believe that this would create an extremely awkward situation, not only for Consumers' Gas but also for this Board and the Ontario Energy Board. As I understand the case law, where a company is engaged in a single undertaking, the courts will not divide jurisdiction over that undertaking between Parliament and a province; see, for example, *Re Ottawa-Carleton Regional Transit Commission* (1984), 4 D.L.R. (4th) 452, in which the Ontario Court of Appeal held that the entire undertaking of a regional bus service fell under federal jurisdiction because a few of its routes crossed from Ontario into Québec. The court cited *A.G. Ontario v. Winner*, [1954] A.C. 541 (P.C.), as "a complete answer to the submission that the bus routes to Hull could be severed from the operations of [the transit undertaking]." Accordingly, I believe that it is incorrect to sever the Ottawa East line from the undertaking of Consumers' Gas.

Having said that, I do not believe that it makes sense to regard the entire undertaking of Consumers' Gas with respect to the Ottawa distribution system as vital, integral and essential to the proposed Niagara line or Niagara's "undertaking". Niagara's undertaking is simply to provide a conduit for the interprovincial movement of gas as required by the integrated operations of Consumers' Gas and Gazifère. Gazifère, not Niagara, is dependent on Consumers' Gas. Niagara has no responsibility to supply gas to Gazifère, but only to provide transportation for gas delivered to it at its interconnections with the Consumers' Gas Ottawa distribution system.

The result of this arrangement is that there is a "link in the chain" of pipelines supplying gas to Gazifère which is not under federal jurisdiction. It seems to me that the real issue before this Board is whether gas to be transported outside a province can move through a local distribution system without having that system, or parts of it, fall under federal jurisdiction. As the majority noted, it is possible to have a provincial link in an otherwise federal chain. In this case, having regard to the integrated nature of the Consumers' Gas undertaking, I believe that it would be incorrect and administratively impractical for this Board to assert jurisdiction over the Ottawa East line.

For the foregoing reasons, I am of the view that this Board will not have jurisdiction over the Ottawa East line once it is connected to the proposed Niagara line, and I dissent from the decision of the majority.

A handwritten signature in dark ink, appearing to read 'R. Illing', with a stylized flourish at the end.

R. Illing
Member

Calgary, Alberta
September 1995

Chapter 7

Dissenting Opinion - R.L. Andrew

I have had the benefit of reviewing the decision of the majority and find that I must reach a different conclusion. In my view, the Ottawa East line and Ottawa Gate Station Facilities ("East Line Facilities") do not properly fall within the Board's jurisdiction as they do not meet the applicable jurisdictional tests enunciated in *United Transportation Union et al v. Central Western Railway*.¹

7.1 Analysis of the Constitutional Question Presented

There is no dispute that the proper test to be applied is that established by the Supreme Court of Canada in *Central Western*. This test has been properly stated by all parties. A work or undertaking may fall within the legislative authority of Parliament, pursuant to section 92(10)(a) of the *Constitution Act, 1867* if (1) that work or undertaking can properly be characterized as a federal work or undertaking; or (2) it is a work or undertaking that is an integral part of an existing core federal work or undertaking.

7.1.1 The Ottawa East Line As A Federal Work And Undertaking

I do not dispute the majority's conclusion that the East Line Facilities are not properly characterized as a federal work or undertaking. The East Line Facilities are located wholly within the province of Ontario. This segment is operated by Consumers' Gas, a provincially regulated, natural gas distribution utility, and will remain so once Niagara Gas' proposed facilities are connected. As such, the East Line Facilities are not in any way operated nor controlled by a federal work or undertaking. It is true that the East Line Facilities and Niagara Gas' proposed facilities will be physically connected. Likewise, Consumers' Gas and Niagara Gas are related through common ownership. However, as it was aptly pointed out by Dickson C.J. in *Central Western* and other decisions, those features are not determinative of the constitutional jurisdictional question.² For reasons which I will discuss in the next section, what determines this issue is the operational nature and function carried out by the Ottawa Distribution System of which the East Line Facilities are integral. In my view, the Ottawa Distribution System operates to provide local natural gas distribution service to customers who are located wholly within the province and more specifically within the Ottawa area. All of which suggest that the East Line Facilities do not comprise a federal work or undertaking.

¹[1990] 3 S.C.R. 112; (1990), 76 D.L.R. (4th) 1 [hereinafter *Central Western* cited to D.L.R.].

²*Ibid.* at 10-12; see also *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission* (1989), 61 D.L.R. (4th) 193 at 218 and 221 [hereinafter *AGT* cited to D.L.R.].

7.1.2 The East Line Facilities As An Integral Part of An Existing Core Federal Work or Undertaking

The approach described by Dickson C.J. in *Central Western* requires analysis of whether a sufficient nexus exists between the subject matter in question and an existing core federal work or undertaking. The nexus is dependent upon the level of functional integration existing between the two works or undertakings in question. This in turn requires examination of the normal and habitual operations of the subject matter. Once considered, a determination can then be made as to whether the existing core federal work or undertaking may be described as being operationally dependent upon the subject matter in question.

Where I depart from the majority in this analysis, is in respect to the consideration of the East Line Facilities separate and apart from the remaining portions of the Ottawa Distribution System. I believe it is improper to simply single out or "carve off" integral portions of a local work and undertaking and subject only those portions to jurisdictional scrutiny. Such an approach skews the ultimate outcome as it underestimates the importance of the local purpose and operational function provided by the subject work and undertaking and tends to overstate the physical dependence the federal work has on the provincial connecting component part. Considering all integral parts of the work or undertaking is more consistent with the approach taken in *Central Western*. There, the normal, habitual operations of the entire Central Western railway system were considered and not simply those parts linking to the Canadian National Railway. Consideration of the overall operations of the undertaking is also consistent with the approach taken by Dickson C.J. in *AGT*, wherein he states:

Let me say at the outset that none of the parties or intervenors in this appeal advocated a divided jurisdiction, with the province regulating intra-provincial or local aspects of the operations of AGT and Parliament regulating the interprovincial and international aspects. It is an all or nothing affair.³

The uncontroverted evidence before this Board is that the Ottawa Gate Station and the Ottawa East line form an integral part of Consumers' Gas' overall Ottawa Distribution System. Integration is evidenced by the operations of the Ottawa Gate Station and the direct connections each of the component parts make to one another. In particular I note that the interconnections between the Ottawa East line and the Ottawa North line⁴ through the Anderson and Innes Road pipelines demonstrate that the Ottawa East line is not operated separate and apart from the remaining portions of this system. Moreover, I also note that local services are provided directly off the Ottawa East line. As a result, I believe the normal, habitual operations of the Ottawa Distribution System as a whole should be considered.

From the submissions received, the Ottawa Distribution System provides local natural gas distribution services to customers located within the Ottawa franchise area. Such service commences when Consumers' Gas receives natural gas at one point, wholly within the province of Ontario. Distribution service then proceeds by Consumers' Gas delivering such volumes to its customers, including Gazifère, at various points along its local intraprovincial grid or system.

³(1989), 61 D.L.R. (4th) 193 at 214. See also *Attorney General for Ontario v. Israel Winner*, [1954] A.C. 541 at 581.

⁴The line extending north from the Ottawa Gate Station to the St. Laurent Control Station (the "Ottawa North line").

The services provided by Niagara Gas are dissimilar from those provided by Consumers' Gas. Niagara Gas simply transports natural gas from one physical point at the Blackburn Hamlet bypass, to one other physical point located along the Gazifère distribution system. The operational nature of this system is in sharp contrast to the operations of both the Ottawa Distribution System and Gazifère's system. These distribution systems take gas from one or a few points located wholly within provincial boundaries and deliver the supply to "burner-tip" customers across local intraprovincial system grids.

I am in agreement with the submissions made by Niagara Gas that the transfer of gas supply is more properly characterized as a connection at the end of a local transportation process. The services which Niagara Gas provides simply start at the "end" of the Ottawa Distribution System and interconnect with the Gazifère system. As I see it, the service which Niagara Gas provides on account for Gazifère, is no different than that which TransCanada provides to Consumers' Gas at the Ottawa Gate Station. While I recognize the state in which gas is delivered to Consumers' Gas at the Ottawa Gate Station is different from that which Niagara Gas delivers to the Gazifère system, that by itself should not be determinative of the jurisdiction question. If that were so, then the whole of the Ottawa Distribution System, Niagara Gas' existing and proposed facilities, and the Gazifère system would be considered as one work or undertaking. That proposition is clearly not what the majority suggests and certainly is not one that I advance here.

I pause to compare these facts to the decision of this Board involving WBI and TransGas.⁵ The issue in that case was whether a part of the provincially regulated Trans Gas pipeline system, known as the Steelman/North Portal Extension, properly fell within this Board's jurisdiction given that it connected and supplied the federally regulated WBI pipeline with all of its gas volumes and which volumes were destined for the export market. In a majority decision, this Board found the Steelman/North Portal Extension to fall within federal jurisdiction and subject to its regulation. These facts, although somewhat similar to the ones at hand are distinguishable in one very important respect. The Steelman/North Portal Extension was found to have only one significant purpose, namely the transportation of export gas supply. In my view, WBI's physical dependence upon the Steelman/North Portal Extension was not by itself considered to be enough to bring this system within the Board's jurisdiction. Rather, what determined federal jurisdiction was the operational similarities between the Steelman/North Portal Extension and the WBI system. Such similarities arose because the Steelman/North Portal Extension provided no significant actual or accepted potential local purpose or function.

A similar result is also found in this Board's decision concerning Altamont Gas Transmission Canada Limited.⁶ In that case two interconnecting pipeline segments, the NOVA Wild Horse Mainline and the Altamont Canada Line, were planned to extend from the provincially regulated NOVA system to a point at the international border. The primary purpose of these facilities was the exportation of natural gas. Again, due to the lack of a significant local purpose or function, these segments, in my view, were also found to fall within federal jurisdiction.

In this case, however, the East Line Facilities are in existence, were designed, constructed, and most importantly operate as an integral part of the provincially regulated Ottawa Distribution System. A

⁵National Energy Board GH-R-1-93 Reasons For Decision ("WBI Decision").

⁶National Energy Board GHW-1-92 (February 1993) Reasons For Decision.

primary, local operational purpose and function has therefore been established. The question of normal, habitual operations therefore turns to whether a second purpose that encompasses the services and operations used to provide supply to Gazifère, is one that is so significant or important that it should cause the whole of the Ottawa Distribution System to fall within federal jurisdiction.

In analyzing this question, I recognize there is case law suggesting that when a minor but regular interprovincial transportation service forms part of the larger intraprovincial services offered by an entity, it may cause the whole operation to fall within federal jurisdiction.⁷ However, I am persuaded that a different approach must be used to properly consider normal, habitual operations as is required under the second part of the *Central Western* test. This fact was noted most recently by the Québec Court of Appeal in *Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications)*⁸ when it stated:

... the attitude of the Court is different when they have to decide whether a local undertaking can be an integral part of a federal undertaking. In such a case, they require that a major part of the local undertaking's normal and usual activities be done for the federal undertaking: see *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers* (1973), 40 D.L.R. (3d) 105, [1975] 1 S.C.R., [1974] 1 W.W.R. 452; *Montcalm Construction Inc. v. Minimum Wage Commission* (1978) 93 D.L.R. (3d) 641, [1979] 1 S.C.R. 754, 79 C.L.L.C. ¶ 14,190; *Northern Telecom Canada Ltd. v. C.W.C.* (1983), 147 D.L.R. (3d) 1, [1983] 1 S.C.R. 733, 48 N.R. 161. (my emphasis)

This method of inquiry was also used by Reed J. in the trial judgment of AGT to determine the nature and importance of AGT's normal, habitual operations.⁹ It is noteworthy that Dickson C.J. later recognized this approach without dissent and placed emphasis upon the necessary finding that the regular and continuous interprovincial operations must comprise a significant degree of the overall operations.¹⁰

Concerning the facts at hand, the evidence which I feel is compelling is that the design day flow rate through Niagara Gas's proposed facilities represents only 13 percent of the Ottawa Gate Station design day flow rate. In my view, something more is necessary to demonstrate this level of forecasted flow will represent a significant or major part of the overall Ottawa Distribution System operations, and that the remaining operations and services are only of minor importance.

There is one further aspect which I believe should form part of the sufficient nexus analysis. It is the consideration of whether federal regulation of the subject matter in question must be shown to be integral to a core federal work or undertaking. This relates to the comments made by Dickson C.J. in *Central Western* when he discussed the approaches used in considering the two part jurisdictional test:

⁷See, for example, *Re Tank Truck Transport Ltd.* (1960), 25 D.L.R. (2d) 161 affirmed, 36 D.L.R. (2d) 636 (Ont.C.A.); *R.V. Cooksville Magistrate's Court; ex parte Liquid Cargo Lines Ltd.*, [1965] 1 O.R. 84 (Ont.H.C.); and *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union* (1983), 4 D.L.R. (4th) 452 (Ont. C.A.).

⁸(1992), 99 D.L.R. (4th) 241 at 249, affirmed [1994] 1 S.C.R. 878.

⁹*AGT v. C.R.T.C.* (1985) 15 D.L.R. (4th) 515 at 532-33 (F.C.).

¹⁰*AGT, supra*, note 2 at 212.

For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is *itself* an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking. (emphasis added)

I must take exception with the majority's interpretation of the emphasized words above. As I understand its position, because Dickson C.J.'s subsequent analysis in this case does not mention the necessity of federal regulation over Central Western, such consideration was never intended to form part of the two-part analysis.

I am not persuaded that the lack of further expression by Dickson C.J. renders the point inconsequential. Chief Justice Dickson's statement comes at the outset of his decision.¹¹ In my view it is intended to highlight the difference in the approach used when one analyzes the two parts of the test. The lack of elaboration was more likely related to the facts in question. The issue in that case concerned federal jurisdiction over labour relation matters rather than jurisdiction to regulate the whole of a subject matter's operations.

It is not uncommon for courts to consider the effectiveness of how an entity has been regulated as a part of the Court's constitutional jurisdictional analysis.¹² Where the operations of both the subject matter and the core federal work or undertaking are existing regulated monopolies and for that reason subject to substantive regulatory schemes that significantly impact how operations and management are carried out, it makes inherent sense to consider whether federal regulation of the subject matter can be seen as integral to the operations of the core federal work or undertaking. I see such an approach as being consistent with the requirement of having to review the normal habitual operations of the works and undertakings in question. This assists in determining whether practical or functional integration exists. If it can be shown that the core federal work or undertaking is somehow dependent upon the federal regulation of the subject matter in question, then, in my view, functional integration is established.

In the case before us, there is no evidence to suggest that Niagara Gas' proposed facilities will in any way be impaired or affected by the manner in which the Ottawa Distribution System has been provincially regulated. To the contrary, the submissions made on behalf of Niagara Gas clearly indicate that the operations of Niagara Gas' proposed facilities and the East Line Facilities are intended to operate in a manner analogous to the Ottawa North line and Niagara Gas' Rockcliffe pipeline. Yet in that instance this Board only regulates Niagara Gas' Rockcliffe pipeline. The connecting Ottawa North line of the Ottawa Distribution System has remained within provincial jurisdiction, regulated by the Ontario Energy Board. This, in my view, evidences the fact that each of these parts were intended to operate within separate jurisdictional spheres, and, in fact, continue to do so. Without some evidence to suggest the integrity of the federal regulatory scheme in which Niagara Gas' proposed facilities are to operate is in some way jeopardized by the existing provincial scheme, I do not believe the condition of federal regulatory dependency is satisfied.

¹¹*Central Western*, *supra*, note 1 at 8.

¹²See *A.G.T. v. C.R.T.C.* (1985), 15 D.L.R. (4th) 515 at 519 (F.C.) referred to by Dickson C.J. in *AGT*, *supra*, note 2 at 396. See also *Fulton v. Energy Resources Conservation Board*, [1981] 1 S.C.R. 153, (1981), 118 D.L.R. (3d) 577 (S.C.C.).

Historically, I note this Board has regulated facilities which simply "link" or "bridge" across interprovincial or international boundaries. The reason, in my view, relates to Parliament's intent when it first enacted the *National Energy Board Act*. It is well known that this legislation resulted from recommendations made to Parliament by the Borden Royal Commission.¹³ As discussed in the First Report, the National Energy Board was considered as a necessary control mechanism which, through the regulation of pipeline systems, could ensure effective market access and efficient use of the natural resource being transported across interprovincial and international boundaries.¹⁴ The Commission never intended this Board to regulate more than was necessary to ensure effective control across interprovincial and international boundaries. Provincial regulatory schemes were recognized as operating alongside the new federal scheme. So long as provincial schemes did not impede the effectiveness of the federal regulatory authority of Parliament, the Commission recommended that Parliament should limit the exercise of its jurisdiction over provincially connecting facilities.¹⁵

In my view, this restraint has consistently been carried out by this Board. Facilities falling within the Board's Group 2 Pipeline Company status in particular have a common trait wherein only facilities that actually cross interprovincial or international boundaries have been regulated by this Board.¹⁶ As a result, the provincial parts connecting to such federal lines have remained outside of the federal sphere and within the provincial scope of regulation. This has created a certain, systematic and orderly regulatory scheme. Jurisdictional certainty in particular has resulted, benefiting all industry participants.

I do not believe the effectiveness of this Board's regulatory authority over the Niagara Gas system is dependent upon the assertion of jurisdiction over the East Line Facilities. There is nothing in the record to suggest the Board will lose an effective means of facilitating supply access to local Québec markets.

Based on the foregoing, I do not find there is a sufficient nexus between Niagara Gas' proposed facilities and the Ottawa Distribution System. Each undertaking can continue to operate within distinct jurisdictional spheres. The services each system provides are unique. Although Niagara Gas is physically dependent upon Consumers' Gas for the transportation of supply, this fact alone should not overshadow the nature of and differences in the services and operations each provides.

From a policy perspective, I believe it is important to recognize that this matter was not one which arose because of some complaint that concerned a defect in how Consumers' Gas has been regulated provincially in the past, or how its operations in the future will in any way impact those of Niagara Gas or Gazifère. None of the traditional regulatory issues of public convenience and necessity, environment, tolling, access or issues concerning general fairness have been raised. National policy issues are likewise not readily apparent.

¹³Canada Royal Commission On Energy, First Report (October 1958).

¹⁴*Ibid.* at 3-12.

¹⁵*Ibid.* at 2-21, 2-22.

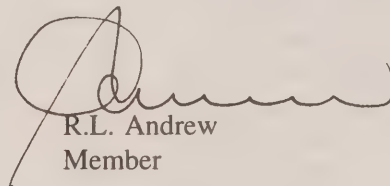
¹⁶This point is discussed in more detail in the dissenting reasons of J.-G. Fredette in the Board's GHW-1-92 Reasons for Decision. Seventeen "bridge" gas pipelines were, at that time, regulated by this Board as referenced at page 29.

I am concerned that the decision of the majority represents a policy shift in how this Board intends on asserting jurisdiction over portions of pipeline facilities that have traditionally operated outside the federal jurisdictional sphere. In the short term at least, I believe the majority's decision could lead to greater unnecessary jurisdictional and regulatory uncertainty, greater duplication in regulation and greater administrative costs which ultimately are passed on to consumers. Furthermore, I see no tangible or intangible benefit accruing to the provinces, the federal government and most importantly, the Canadian public.

In the long term, asking constitutional questions in an *ad hoc*, segmented manner where no complaint arises, moves this Board along an uncertain path, leaving one to only speculate where the true boundaries of this Board's jurisdiction start and end. If the Board assumes jurisdiction over the East Line Facilities then, for consistency, should it not assert jurisdiction over the Ottawa North line and St. Laurent pipeline¹⁷ due to the connection with the Rockcliffe pipeline and, if that is so, then why not the whole of the Ottawa Distribution and Gazifère Systems? Would those actions then not require other facilities, including other distribution systems that link between two federally regulated systems, to fall subject to jurisdictional scrutiny? Does that not then take this Board to the quintessential question of whether it can assert jurisdiction over other, more substantive, upstream pipeline systems?

Obviously, at this time I am concerned that the majority's decision leaves no room for connected provincially regulated pipeline entities to operate without being "swept in" to federal jurisdiction. Without substantive justification for what will amount to a shift in regulatory policy, I believe it is in the public's best interest to maintain what has been a consistent approach in this Board's exercise of regulatory jurisdiction.

In a vein similar to the dissenting reasons given by Mr. Fredette in the WBI Decision, but on the facts that are now before me, I also find that there must be a point certain at which a federally regulated pipeline, such as Niagara Gas' proposed facilities, transporting gas only across an interprovincial border does not affect the jurisdictional status of connecting provincially regulated pipelines. Otherwise, there would indeed be few, if any, provincially regulated pipelines and the division of powers over works and undertakings such as pipelines, would have no purpose.

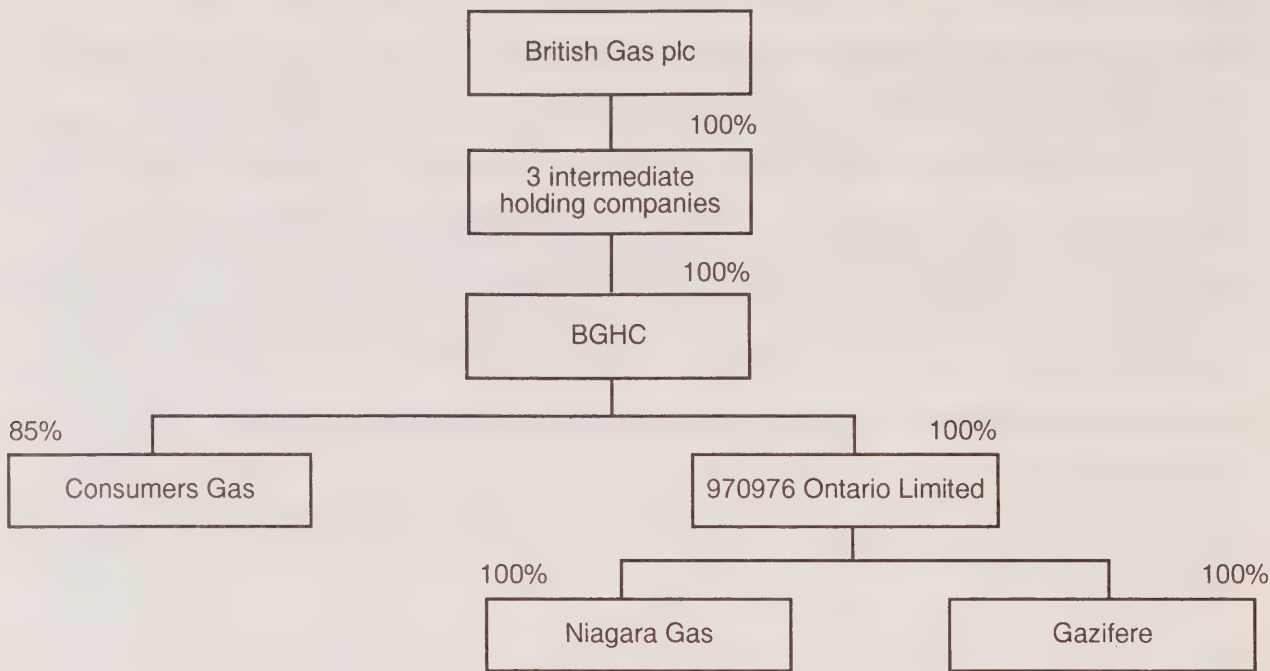


R.L. Andrew
Member

Calgary, Alberta
September 1995

¹⁷This pipeline connects with the Ottawa North line at the St. Laurent Control Station and then extends north, connecting to the Rockcliffe pipeline (the "St. Laurent pipeline").

Consumers' Gas Schematic



Appendix II

Consumers' Gas XHP. Pipeline System Schedule NEB - 43C

